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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GARRETT O'HAVER, Plaintiff and Appellant, v. COUNTY OF LOS ANGELES, Defendant and Respondent.	B259487 (Los Angeles County Super. Ct. No. BC489558)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth Lippett, Judge. Affirmed.

Law Offices of Helena Sunny Wise and Helena Sunny Wise for Plaintiff and Appellant.

Gutierrez, Preciado & House, Calvin House, Nohemi Gutierrez Ferguson and Clifton A. Baker, for Defendant and Respondent.

Plaintiff Garrett O'Haver appeals from the judgment entered for the County of Los Angeles in his action for whistleblower retaliation, contending that the trial court erred by denying his new trial motion, which raised claims of improper evidentiary exclusion, instructional error, and jury misconduct. He also contends that the trial court erred by awarding costs in whole or part to the County. We affirm, in large part because O'Haver has provided an inadequate appellate record.

FACTS AND PROCEDURAL HISTORY

Garrett O'Haver sued the County of Los Angeles for whistleblower retaliation (Lab. Code, § 1102.5), alleging that he was stripped of his duties as a labor compliance officer with the County's public works department and deprived of promised job benefits after he went public with complaints that the department was not complying with certain mandated labor requirements, including the payment of prevailing wages to employees of contractors working for the County. In July 2014, a jury rendered a special verdict for the County, finding that even though O'Haver did make certain whistle blowing disclosures, and had not received the promised job benefits, his disclosures concerning the County's labor law compliance were not a factor in that decision.

O'Haver brought a new trial motion on three grounds: (1) jury misconduct; (2) erroneous orders granting several pretrial motions by the County to exclude certain evidence; and (3) error by failure to give certain requested instructions. After hearing argument on the motion, the trial court took the matter under submission. It then issued a minute order that said the motion was denied, but without explanation or stated reasons.

O'Haver appealed, but prepared an appellate record of largely irrelevant material. The appellant's appendix does include each party's points and authorities in connection with the County's several pretrial evidentiary motions, a copy of the trial court's handwritten mark-up notes on proposed jury instructions, and the party's points and authorities in connection with O'Haver's motions for new trial and to tax costs. However, nearly 2000 pages of the approximately 2400-page appellant's appendix are devoted to the points and authorities and supporting evidence submitted in connection

with O'Haver's successful opposition to the County's summary judgment motion even though that motion is not at issue on appeal.[1]

O'Haver also designated only discrete portions of the reporter's transcript, limited to: hearings on the County's pretrial motions to exclude certain evidence; discussion of jury instructions, including some proposed by O'Haver that the trial court intended to refuse; and the hearing on O'Haver's new trial motion. As to both the pretrial evidentiary and new trial motions, the trial court took those matters under submission, and the record does not include the trial court's eventual rulings on the pretrial motions. The record does not include either the written or verbal jury instructions actually given to the jury. Finally, the record includes none of the trial proceedings or witness testimony. As discussed below, these errors are fatal to O'Haver's contentions concerning the evidentiary, instructional, and juror misconduct claims.

STANDARD OF REVIEW

We review the trial court's order denying a new trial motion under the deferential abuse of discretion standard. (*Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694.) We cannot reverse unless the error was prejudicial. In making this determination, we are obligated to examine the entire record, including the evidence, and independently determine whether or not any error was harmless. (*Id.* at p. 694.) This standard applies to each of the three types of rulings at issue on appeal.

Jury misconduct is a ground for a new trial. (Code Civ. Proc., § 657, subd. (2).) When reviewing an order denying a new trial motion based on that ground, we must review the entire record, including the evidence, and determine independently whether the misconduct, if it occurred, prevented the complaining party from having a fair trial. (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 321 (*Glage*).)

When reviewing a claim of instructional error in a civil case, we cannot reverse if error occurred unless, after examining the entire record, we conclude that the error was

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[1] The statement in the opening brief that the parties stipulated that all of O'Haver's evidence would be admissible does not identify evidence that in fact was admitted.

prejudicial. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) Instructional error is prejudicial when it seems probable the error affected the verdict. In order to determine that issue we must evaluate the state of the evidence, the effect of other instructions, the effect of counsel's arguments, and any indications that the jury was misled. (*Id.* at pp. 580-581.)

Even if the trial court erred by excluding certain evidence, we will not reverse unless, after examining all the evidence, we conclude that a different result was more reasonably probable absent the erroneous ruling. (Evid. Code, § 354; *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802; *California Crane School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal.App.4th 12, 24.)

DISCUSSION

1. *No Error in Denying O'Haver's New Trial Motion*

It is a fundamental rule of appellate review that appealed orders and judgments are presumed correct, that we presume the absence of error where the record is silent, and that error must be affirmatively shown. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187.) In order to show that error occurred, the appellant must provide an adequate record for meaningful appellate review. If he does not, the judgment must be affirmed. (*Ibid.*)

O'Haver has failed to meet this burden in regard to all three issues he has raised on appeal in connection with his new trial motion.

Instructional Error. O'Haver claims the trial court erred by refusing to give instructions concerning issues of harassment and hostile work environment. However, in regard to his instructional error claim, he provided only the trial court's handwritten notes on proposed jury instructions, and the transcript from the court's discussions as to which instructions it would give the jury. Although this provides some indication of how the jury might have been instructed, without a record of the actual instructions to the jury we have no way of knowing which instructions were actually given. O'Haver's failure to

include either the written instructions or a transcript of the trial court's recitation of those instructions leaves us unable to determine whether error actually occurred. Even if we could determine that error occurred, O'Haver's failure to provide a record of the evidence or arguments of counsel leaves us unable to determine whether any such error was prejudicial.

Motion in Limine. As for O'Haver's contention that the trial court erred by granting several pretrial motions that excluded certain evidence, the record designated by O'Haver shows only the parties' respective points and authorities, their arguments to the trial court, and the trial court's statement that it was taking each motion under submission. Apart from a hearing where the trial court acknowledged that it had granted one of the County's motions, the record does not include the trial court's rulings on the pretrial evidentiary motions. As a result, we cannot say that error occurred. Even if we could determine that error occurred, the absence of a record of the evidence presented at trial leaves us unable once more to determine whether any such error was prejudicial.

Jury Misconduct. O'Haver's jury misconduct claims were based on the declaration of Juror No. 9, who contended that the foreman, Juror No. 14, and Juror No. 13, engaged in certain inappropriate conduct. According to Juror No. 9, Juror No. 14, who was a lawyer, "mimicked" the trial court and the lawyers during the trial proceedings and made numerous distracting comments. Juror No. 14 also supposedly offered "legal guidance" during the deliberations. According to Juror No. 9, Juror No. 14 had not wanted to serve as a juror and rushed the deliberations to achieve a verdict.

Juror No. 9 accused Juror No. 13 of bias, contending she said O'Haver was lucky to have a job and that employers would not take advantage of their employees. According to Juror No. 9, Juror No. 13 was "so adamantly opposed to ruling against an Employer that she refused to participate in further jury deliberations . . . ." Juror No. 3 told Juror No. 9 that he believed "jury nullification had taken place."[2]

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[2] The new trial motion was also supported by the declaration of O'Haver's lawyer, in which she recounted various troubling remarks supposedly made to her by some of the jurors after the trial ended. To the extent the lawyer's declaration attempted to recount

Juror No. 14 submitted a declaration in opposition to the new trial motion. Juror No. 14 agreed with Juror No. 9 that she had told the other jurors the trial court would not let them see a timeline chart that O'Haver's lawyer used during closing argument. She denied trying to stop the other jurors from asking to see the document, however. Otherwise, Juror No. 14 denied Juror No. 9's accusations.

We agree with the County that most, if not all, the statements made by Juror No. 9 were either inadmissible or did not amount to misconduct. (Evid. Code, § 1150; *Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 349 (*Barboni*) [evidence of jurors' internal thought processes is inadmissible to show misconduct]; *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1446 [no misconduct where jurors fail to vote on certain issues, were discouraged from asking questions, or were rushed into reaching a verdict].)

We need not reach those issues, however. We apply the substantial evidence standard of review to the trial court's factual findings on jury misconduct and will not second guess its credibility determinations. (*Barboni, supra*, 210 Cal.App.4th at p. 349.) Given the silent record, we presume the trial court determined that Juror No. 9 was not credible and accepted Juror No. 14's version of events. Furthermore, even if misconduct occurred, O'Haver's failure to include the evidence from trial in the appellate record prevents us from determining whether any misconduct was prejudicial. (*Glage, supra*, 226 Cal.App.3d at p. 321.)

2. *The Costs Award Was Proper*

The County asked the trial court to award it a little more than $40,000 in costs, approximately $21,000 of which went to pay for technological presentation and support services. O'Haver moved to tax costs on two grounds: (1) the trial court should adopt the reasoning of a recent federal civil rights decision and find that cost awards are not proper against the losing plaintiff in a whistleblower action; and (2) specific portions of

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remarks made by other jurors, it was hearsay. (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256.)

the County's costs bill—in particular the technological support services charges—were unwarranted. The trial court rejected O'Haver's contentions and, after eliminating certain charges, awarded the County costs of slightly more than $39,000.

O'Haver renews these contentions on appeal. First, he contends that employment discrimination decisions such as *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 and *Harris v. Maricopa County Superior Court* (9th Cir. 2011) 631 F.3d 963, established a rule that prevailing defendants should be awarded costs only when the plaintiff's action was objectively without merit. O'Haver contends that his whistleblower action is akin to civil rights and employment discrimination claims and should be subject to the same restrictions against awarding costs to prevailing defendants. We disagree.

In both cases, the applicable statutes authorized a discretionary award of attorney's fees and costs to prevailing defendants which the courts found took precedence over the general award of costs under Code of Civil Procedure section 1032 et. seq. The *Harris* and *Williams* courts were merely describing the boundaries of that discretion. O'Haver's cause of action for whistleblower retaliation arises under Labor Code section 1102.5, which says nothing about whether costs awards are discretionary. As a result, an award of costs was mandatory. (Code Civ. Proc., § 1032, subd. (b) [unless otherwise provided by statute, prevailing party is entitled to costs as a matter of right].)

Finally, O'Haver asks us to follow *Science Applications Internat. Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1103, which held that technological presentation costs of $2 million were improper in a case where only $1 million in damages were awarded. We agree with the court in *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 991, that times have changed concerning the need for technological support at trial, especially where the more modest amount of $20,000 was claimed in an action that, as best we can tell from the scant record, took nearly three weeks to try. We find no abuse of discretion in the trial court's cost award.

DISPOSITION

The judgment is affirmed. Respondent County of Los Angeles shall recover its appellate costs.

RUBIN, Acting P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.